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No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a criminal defendant's statement obtained in deliberate violation of his Sixth Amendment right to counsel and in circumstances of dubious reliability (a jailhouse "informant"), may nonetheless be admitted as affirmative rebuttal evidence where the defendant testifies in his own defense?

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STATEMENT OF FACTS

The prosecutor filed a complaint with an accompanying affidavit and application for arrest warrant charging Rhonda Theel and Donnie Ray Ventris with felony murder and other charges. Joint Appendix ("J.A.") 18.

After the state arrested Mr. Ventris, the State recruited an informant, Johnnie Doser, and placed him in Mr. Ventris' cell. Pet. App. 8a. Doser said that he "was asked if [he] could get any information out of [Mr. Ventris]." J.A. 146. Doser indicated that the first day in the cell with Mr. Ventris, he did not obtain any incriminating statements. J.A. 148-49, 154. On the second day in the cell together, Doser told Mr. Ventris that he "could tell by the look in [Mr. Ventris'] eyes that he had something more serious weighing in on his mind." J.A. 154. Doser testified that Mr. Ventris asked whether Doser could be trusted. Doser testified that he assured Mr. Ventris of his trustworthiness. J.A. 149, 154-55. Doser claimed that Mr. Ventris then made incriminating statements regarding the alleged offenses. J.A. 150.

The state entered into a plea bargain with Theel to procure her testimony against Mr. Ventris on capital charges. Pet. App. 6a. At jury trial, Theel implicated Mr. Ventris in the murder. Pet. App. 7a. Mr. Ventris testified in his own behalf, denying culpability in the incident. J.A. 56, 112.

The state subsequently sought to introduce Doser's testimony regarding Mr. Ventris' alleged statements. J.A. 142. Mr. Ventris objected, asserting that any statements obtained by Doser violated Mr. Ventris' right to counsel. J.A. 142-43. The prosecutor indicated that "I will grant that [Doser] was placed in

there and there's probably a violation. However, that doesn't give the Defendant unlicensed—a license to just get on the stand and lie." J.A. 143. The state trial court overruled the objection and allowed Doser's testimony. J.A. 143. "In exchange for Doser's testimony, the State released him from probation." Pet. App. 8a-9a.

The jury acquitted Mr. Ventris of felony murder and theft, but convicted him of aggravated robbery and aggravated burglary. Pet. App. 9a.

Mr. Ventris filed a timely motion for new trial renewing the Sixth Amendment claim. J.A. 31-34. Specifically, Mr. Ventris alleged that:

> Johnnie Doser, then an inmate at the Montgomery County Jail, was solicited by the Montgomery County Attorney to be a cell mate of the defendant's following the defendant's arrest, and following the defendant's assertion of his right to counsel. Upon Doser's agreement to cooperate with police, he became an agent of the state.

J.A. 32. In its written response to the motion for new trial, the prosecutor indicated that "[t]he State agrees with the defendant's statement of the facts," and further conceded that "[i]n the case at bar, the defendant's sixth amendment right to counsel may have been violated." J.A. 36-37. The state trial court found that the statements obtained by Doser were voluntary and overruled the motion for new trial. J.A. 163.

After the state trial court imposed a 281-month prison sentence, Mr. Ventris appealed directly to the Kansas Court of Appeals. Pet. App. 9a. In his brief to the Kansas Court of Appeals, Mr. Ventris included a claim that admission of Doser's testimony during

rebuttal violated the Assistance of Counsel Clause. Pet. App. 9a. In its response brief, the state conceded that "[t]he State does not deny that obtaining a statement under such circumstances generally renders such statement inadmissible for proof of the case in chief." Resp. Br. of Appellee at 3, *State* v. *Ventris,* 176 P.3d 920 (Kan. 2008) (No. 94,002). The Kansas Court of Appeals noted that "[t]he State conceded the Sixth Amendment violation but argued the testimony could be used for impeachment purposes," Pet. App. 55a, and later indicated that "[t]he State accurately concedes that through the use of an informant, it initiated a discussion with Ventris in violation of his Sixth Amendment right to counsel." Pet. App. 57a. The Kansas Court of Appeals concluded that such statements could be used for impeachment purposes. Pet. App. 57a.

Mr. Ventris petitioned for review to the Kansas Supreme Court. Pet. App. 9a. The prosecution did not cross-petition for review nor did it file a supplemental brief before the Kansas Supreme Court. J.A. 4. The Kansas Supreme Court granted review and, in its decision, reiterated that "[t]he State concedes that it violated Ventris' Sixth Amendment right to counsel when it surreptitiously planted Doser in Ventris' jail cell as a human listening device." Pet. App. 10a. The Kansas Supreme Court went on to hold that the statements obtained in direct violation of the Sixth Amendment right to counsel could not be used for any purpose in the trial of the charges to which that right to counsel had attached and that the erroneous admission was

not harmless beyond a reasonable doubt. Pet. App. 22a-23a.[1]

The Kansas Supreme Court also separately held that the district court had failed to make adequate findings regarding admission of prior bad acts at trial. Pet. App. 24a-26a. Because the Kansas Supreme Court reversed and remanded on Sixth Amendment grounds, it did not reach the issue of whether this independent holding would require reversal of the conviction. Pet. App. 26a.

SUMMARY OF ARGUMENT

The question is whether the prosecution may impeach an accused's testimony at trial by use of a prior inconsistent statement made to a jail house informant when the accused was not made aware that he was speaking to an informant, did not have counsel's assistance and did not waive the right to counsel. The answer is no. The use of an

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[1] After the Kansas Supreme Court filed its decision, the State filed a "Notice of Intent to Appeal to the United States Supreme Court" in the state trial court, Br. in Opp'n ("BIO") App. B, but never sought to stay the appellate mandate. By rule, the Kansas Supreme Court's mandate ordering a new trial issued on February 25, 2008. BIO App. A. The State did not try Mr. Ventris within 90 days, as required by Kan. Stat. Ann. § 22-3402. On June 1, 2008, Mr. Ventris filed a motion for discharge, which the trial court denied. BIO App. C. On July 10, 2008, Mr. Ventris filed a motion with the Kansas Supreme Court seeking enforcement of its mandate. BIO 10. But after this Court granted the petition for a writ of certiorari, the Kansas Supreme Court issued an order without further explanation, indicating that it did not have jurisdiction to entertain a motion to enforce its own mandate. J.A. 6. As a result, the issue of whether, regardless of any decision of this Court, Mr. Ventris is entitled to relief under Kan. Stat. Ann. § 22-3402, remains unresolved by the state court of last resort.

uncounseled statement at trial, even for impeachment purposes, violates an accused's right to counsel because it necessarily impairs counsel's ability to subject the prosecution's evidence to the adversarial testing the Sixth Amendment requires.

Petitioner concedes that it violated Mr. Ventris' right to counsel, but argues that there must be some impeachment exception for Sixth Amendment right to counsel violations. Specifically, petitioner argues that the remedy is merely to permit impeachment in all cases, even when the violation is deliberate. Petitioner's argument assumes application of an exclusionary rule, but would allow consideration of the same exclusionary rule factors that apply to violations of the Fourth Amendment, and the prophylactic rules that ensure knowing and voluntary waivers under *Miranda* and *Jackson*. But this argument simply assumes that an exclusionary rule for the Assistance of Counsel Clause must necessarily follow the rules for Fourth Amendment, *Miranda*, and *Jackson*, without examining the meaning of the Assistance of Counsel Clause or assessing what a violation of the Clause entails.

The right to counsel is the accused's right to have an advocate on his behalf during every critical stage of a prosecution who can subject the prosecution's evidence to adversarial testing through skillful and informed examination. Counsel's absence from an interrogation impairs counsel's ability to subject the resulting testimony to the adversarial testing the Sixth Amendment right to counsel demands. The violation of the right to counsel is not just the manner in which the police obtain uncounseled statements from the accused, but the actual use of those statements at trial.

Thus, a Sixth Amendment exclusionary rule that allowed use of uncounseled statements for impeachment would not deter violations of the right to counsel, but would ratify and encourage them. The only rule that would provide an adequate remedy for violations of the Sixth Amendment right to counsel, and the violation in this case, is exclusion from trial for all purposes, including impeachment. Any other rule would seriously undermine the adversarial system, which the Sixth Amendment does not permit.

Moreover, the logical and practical implication of the Sixth Amendment makes uncounseled statements inadmissible for any purpose. The Assistance of Counsel Clause forbids anything that would deny the right it guarantees. The use of uncounseled statements at trial, even for impeachment, denies that very right.

Even if an exclusionary rule for Assistance of Counsel Clause violations were to permit impeachment, the Court should limit the exception to just those instances the petitioner argues it is necessary—when an accused testifies untruthfully. An exception for any type of impeachment sweeps too broadly than is necessary to protect the interest petitioner claims.

ARGUMENT

I. THE SIXTH AMENDMENT MAKES UNCOUNSELED STATEMENTS INADMISSIBLE FOR ANY REASON BECAUSE THEIR USE AT TRIAL, EVEN FOR IMPEACHMENT, UNDERMINES THE ADVERSARY PROCESS.

A. Exclusionary Rules Allow For An Impeachment Exception Only When The Use Of Tainted Evidence At Trial Does Not Violate An Enumerated Constitutional Right Essential To A Fair Trial.

1. There is no single exclusionary rule, but several. The Fourth Amendment exclusionary rule makes evidence obtained in an unreasonable, warrantless search or in a search executed in reliance on an invalid warrant generally inadmissible. *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995). The Confrontation Clause demands exclusion of testimonial hearsay statements when the prosecution does not make the declarant available for cross-examination. *Crawford* v. *Washington*, 541 U.S. 36, 59 (2004). Similarly, the Self-Incrimination Clause prohibits compelling an accused to be a witness against himself. U.S. Const. amend V. The Self-Incrimination Clause contains its own, self-executing exclusionary rule. *United States* v. *Patane*, 542 U.S. 630, 640 (2004) (plurality opinion).

This Court has also recognized prophylactic rules with exclusionary components to safeguard enumerated constitutional rights. The *Miranda* rule is a judicially-created prophylactic rule designed to protect the right against self-incrimination by "creat[ing] a presumption of coercion [in custodial interrogations] in the absence of specific warnings…."

Patane, 542 U.S. at 639. In *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981), this Court recognized a related rule that created a presumption that a defendant's waiver of his right to counsel under *Miranda* was invalid if it resulted from a police-initated interrogation. The Court also recognized an analogous rule related to waiver of the Sixth Amendment right to counsel in *Michigan* v. *Jackson*, 475 U.S. 625, 632 (1986).

2. The exclusionary rules for violations of the Fourth Amendment, *Miranda*, and *Jackson,* permit the use of tainted evidence to impeach an accused's trial testimony. The common feature of these rules is that the use of the tainted evidence does not violate an enumerated Constitutional right an accused is to enjoy at trial. Exclusion under these rules is a prophylactic measure to safeguard an enumerated right.

The Fourth Amendment exclusionary rule permits an impeachment exception because it only seeks to deter various proscribed police practices, and the use at trial of evidence obtained by those practices does not itself violate the Fourth Amendment. The Fourth Amendment exclusionary rule is always a prophylactic measure designed to deter police misconduct. *Chimel* v. *California*, 395 U.S. 752, 766 n.12 (1969). Admitting illegally obtained evidence at trial does not violate the Fourth Amendment itself. *United States* v. *Calandra*, 414 U.S. 338, 354 (1974). The constitutional violation lies in the police conduct that tainted the evidence, such as, for example, executing a search in reliance on a facially deficient warrant. *United States* v. *Leon*, 468 U.S. 897, 906, 923 (1984). Even the admission of tainted evidence in the prosecution's case-in-chief would not violate the Fourth Amendment. *Evans*, 514 U.S. at 10. Only

an exclusionary rule prevents its admission in the case-in-chief. *Calandra*, 414 U.S. at 354. Relaxing the rule to allow the admission of the tainted evidence for impeachment does not offend the Fourth Amendment. *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

Admitting voluntary statements obtained in violation of *Miranda* does not violate the Fifth Amendment. *Harris* v. *New York*, 401 U.S. 222, 224 (1971). The Self-Incrimination Clause only prohibits the use of involuntary statements. If statements are voluntary, then their use at trial, even in the prosecution's case-in-chief, would violate only the prophylactic rule of *Miranda*, not the Self-Incrimination Clause, and the relaxation of the rule to permit the use of tainted evidence for impeachment does not offend the Fifth Amendment. *Patane*, 542 U.S. at 639.

This Court recognized a similar prophylactic rule for assessing the validity of waivers of the Sixth Amendment right to counsel. *Jackson*, 475 U.S. at 632. If an accused invokes the right to counsel at arraignment, his subsequent waiver of the right is invalid if he makes it in the course of a police-initiated interrogation. *Id.* at 635. But the use of statements made subsequent to a waiver of the right to counsel does not violate the Sixth Amendment itself. *Michigan* v. *Harvey*, 494 U.S. 344, 352 (1990). If the prosecution can establish that the accused knowingly and voluntarily waived the right to counsel, his statements are admissible for impeachment, even though the police obtained the waiver in violation of the prophylactic rule in *Jackson*. *Id.* at 354. In fact, the *Harvey* Court declined to adopt the holding the petitioner proposes, even though it would have been equally dispositive

and made the holding the Court actually adopted irrelevant. *Id.*

3. However, this Court has never permitted an impeachment exception for violations of trial rights enumerated in the constitutional text. The Self-Incrimination Clause applies "in any criminal case" and allows no exception for impeachment: "we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing [to prevent perjury], therefore, is not simply unnecessary. It is impermissible." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). Similarly, the Confrontation Clause applies "[i]n all criminal prosecutions" and allows no exception for impeachment. *Crawford*, 541 U.S. at 42, 59 n.9 (alteration in original). This Court noted that both of these trial rights insured the integrity of the adversarial process. *Id.* at 61-62; *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay.").

4. The exclusionary rule for Assistance of Counsel Clause violations need not follow the logic of the rules for the Fourth Amendment, *Miranda*, and *Jackson*. Each of these rules has its own origins, purposes, and policies. It stands to reason they would not have the same contours or dictate the same results. "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

Petitioner leaps to the conclusion that the Assistance of Counsel Clause requires an exclusionary rule that follows the logic of the Fourth Amendment, *Miranda*, and *Jackson*. But unlike the

Fourth Amendment, the Sixth Amendment right to counsel is a right an accused is to enjoy a trial. Nor is the Sixth Amendment right to counsel a mere prophylactic rule like *Miranda* or *Jackson*—it is itself the right. The logic of the exclusionary rules for the Fourth Amendment, *Miranda*, and *Jackson,* would impermissibly compromise the Sixth Amendment right to counsel. Instead, the logic of the exclusionary rules of the Self-Incrimination Clause and the Confrontation Clause applies to the Assistance of Counsel Clause. The logical and practical implication of the Sixth Amendment text makes uncounseled statements inadmissible at trial, even for impeachment purposes.

B. The Right To Counsel, Guaranteed By The Assistance Of Counsel Clause Of The Sixth Amendment, Is Essential To A Fair Trial.

1. The Framers understood the right to counsel to include aid in attacking the prosecution's evidence in an adversary process. The right to counsel, as embodied in the Assistance of Counsel Clause, has remained constant, even as criminal procedure has changed to include the routine use of pretrial police interrogation.

The Assistance of Counsel Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Framers understood the assistance of counsel to mean that the accused should have a champion in an adversarial system, exposing the weaknesses in the prosecution's evidence through skilled and informed examination. English common law did not recognize the right to assistance of counsel in felony cases. William M. Beaney, The

Right to Counsel in American Courts 9 (1955). Judges could exercise their discretion and permit an accused to have counsel, but then limit counsel's assistance to supplying answers to purely legal questions the accused himself suggested. James J. Tomkovicz, The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution 8 (2002). Rejecting the English rule, the American colonies almost without exception permitted an accused to have counsel in felony cases. *Powell* v. *Alabama*, 287 U.S. 45, 64-65 (1932). More importantly, the American colonies rejected the rule limiting counsel's assistance to answering the accused's legal questions and permitted the assistance of counsel to expose the prosecution's evidence to an adversary's scrutiny. *United States* v. *Wade*, 388 U.S. 218, 224-25 (1967); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 Yale L.J. 1000, 1033-34 (1964). Because the assistance of counsel includes help in marshalling facts in an accused's defense and attacking the prosecution's evidence, this Court has recognized that the Assistance of Counsel Clause necessarily means that an accused shall enjoy the right to counsel before trial to help him prepare his defense. *Powell*, 287 U.S. at 56-57, 71.

Although the Assistance of Counsel Clause has not changed since the adoption of the Sixth Amendment, criminal procedure has. One innovation of criminal procedure is the use of pretrial interrogation. "[T]he routine practice [of custodial police interrogation] is itself a relatively new development." *Dickerson* v. *United States*, 530 U.S. 428, 435 n.1 (2000). Consequently, this Court has recognized that the Assistance of Counsel Clause guarantees the right to have counsel present at every stage of a prosecution

when counsel's presence is necessary to protect an accused's right to a meaningful defense, including during surreptitious pretrial interrogations. *Massiah* v. *United States*, 377 U.S. 201, 206-07 (1964).

2. The right to counsel complements the other trial rights of the Sixth Amendment as part of an adversarial system. "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." *Maine* v. *Moulton*, 474 U.S. 159, 168 (1985). This Court explained in *Powell*,

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

287 U.S. at 69. The right to counsel requires testing of the prosecution's evidence in an adversarial process, even if that process sometimes impairs the truth-seeking function of a criminal trial. For

example, counsel may pursue a defense seeking an acquittal, even when the accused is actually guilty. *Wade*, 388 U.S. at 256-57 (White, J., dissenting in part and concurring in part). Moreover, the assistance of counsel permits a defendant to deploy his other constitutional rights in his defense, even if those rights impede the search for truth, as when counsel assists an accused in a motion for discharge for violation of the Speedy Trial Clause. *Moulton*, 474 U.S. at 169.

3. The Sixth Amendment rights not only guarantee a fair trial, but define it as one that provides an adversary process. The right to counsel is the most important of the rights enumerated in the Sixth Amendment. *United States* v. *Cronic*, 466 U.S. 648, 653-54 (1984). These rights are not only essential to a fair trial, but define what constitutes a fair trial. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). The Sixth Amendment creates an adversarial system and commands the provision of numerous rights to the accused in a criminal trial:

> The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

Watts v. *Indiana*, 338 U.S. 49, 54-55 (1949) (plurality opinion).

These trial rights sometimes impair the fact-finding function of a criminal trial. For example, the remedy for a Speedy Trial Clause violation is dismissal of the prosecution, even if that means a guilty person would go free without standing trial. *Strunk* v. *United States*, 412 U.S. 434, 439-40 (1973).

As this Court explained in *Gonozalez-Lopez*, "the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." 548 U.S. at 145. With respect to the particular right to counsel of choice, the Court held that "it commands, not that a trial be fair, but that a particular guarantee of fairness be provided." *Id.* at 146. Ultimately, the fairness of a trial depends not on the reliability of the results, but on the extent to which the accused enjoyed the rights enumerated in the Amendment in reaching that result.

4. Use of uncounseled statements infringes on the accused's right to counsel and fatally undermines the adversary process. That process requires testing the truth of the state's allegations under the attack of an experienced advocate in a public trial. Trials should focus on whether the accused actually committed the conduct charged, not whether he could be fooled or forced in a private interrogation into saying he did.

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

Escobedo v. *Illinois*, 378 U.S. 478, 488-89 (1964). The use at trial of uncounseled statements extracted from an accused in a pretrial interrogation would "make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination. . . . One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"" *Wade*, 388 U.S. at 226 (quoting *Escobedo*, 378 U.S. at 487-88).

Counsel's absence from these interrogations creates difficulties in recreating their circumstances so counsel cannot effectively attack the evidence obtained from them as the adversarial process requires. *Id.* at 225-26. "That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court." *Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966). Denying a defendant his right to counsel is akin to denying him the right to present his case. See *Moulton*, 474 U.S. at 168-71. Only when the defendant has been granted access to counsel, freely available during all critical stages in the prosecution, can he make an informed judgment about whether or when to make statements and how to conduct himself. See *id.*

C. The Sixth Amendment Forbids An Impeachment Exception For Uncounseled Statements Because Their Use At Trial For Any Reason Violates The Assistance Of Counsel Clause And Undermines The Adversary Process.

1. A violation of the Assistance of Counsel Clause arises not only from the use of uncounseled statements at trial, but from the manner in which the prosecution obtained them. See *Massiah*, 377 U.S. at 206. This Court's precedents explain that *the use at trial* of uncounseled statements violates the Assistance of Counsel Clause. Prosecutors and police officers have an obligation to respect an accused's right to counsel.[2] *Moulton*, 474 U.S. at 170-71. But the Assistance of Counsel Clause is more than a prophylactic rule to prevent police-initiated

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[2] Petitioner's *amici* make the remarkable suggestion that this Court should disregard the law of this case on two points that are central to the question presented; (1) whether a constitutional violation has occurred at all; and (2) whether the jailhouse informant deliberately elicited Respondent's statements. *See* Br. of Crim. Justice Legal Found. at 6-7 (the underlying question of whether a core Sixth Amendment violation occurred is "fairly included in the question presented"); Brief for the U.S. at 17 n.5 (the "better view" is that "there was no threshold violation of Sixth Amendment standards"). To the extent they are correct, the proper result is dismissal for, as Petitioner concedes, the question presented concerns the scope of the remedy for such a violation. Pet'r Br. at 18-19. To the extent that the aim of Petitioner and its amici in engaging in this discussion is somewhat different—to persuade the Court to adopt a different perspective on the underlying issues—that represents nothing more than a post hoc effort to mitigate Petitioner's own concessions, *see* Pet. App. 10a, 56a-57a, and should not be countenanced by the Court. Petitioner and its amici made no such disclosures to the Court at the certiorari stage.

interrogations of the accused—the actual use of the accused's uncounseled statements violates the Sixth Amendment. *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977); *Morrison*, 449 U.S. at 365; *Wade*, 388 U.S. at 240-43. As the Court held in *Massiah*, an accused is "denied the basic protections" of the right to counsel "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206; see also *Nix* v. *Williams*, 467 U.S. 431, 456 (1984) (Stevens, J., concurring in judgment) ("If the trial process was not tainted as a result of [the pretrial interrogation], this defendant received the type of trial that the Sixth Amendment envisions."). Petitioner and the Solicitor General of the United States concede these points. Br. of Pet'r at 18-19; Br. for the U.S. at 17 n.4.

The Assistance of Counsel Clause guarantees an accused the assistance of an advocate who can subject the prosecution's evidence to adversarial testing. If the prosecution is allowed to use uncounseled statements at trial, even just for impeachment, the prosecution is functionally tying counsel's hands before the parties even walk through the courtroom doors. No less than when it is elicited during pre-trial interrogation, presentation of the statement during trial interferes with attorney-client relationship by preventing the defendant from choosing to stay silent on his counsel's advice. Counsel's role also includes pre-trial negotiation and an obligation to create an accurate record that mitigates a defendant's risk and either negates or blunts the force of the prosecution's adversarial position. Counsel cannot fully perform those functions when the prosecution, in knowing

violation of no less a law than the Constitution,[3] perverts the record by eliciting purported statements from counsel's client.

2. The logic of the exclusionary rules for the Fourth Amendment, *Miranda*, and *Jackson* cannot apply to the Sixth Amendment. The Constitutional violation from a pretrial interrogation occurs only when the prosecution uses uncounseled statements from that interrogation at trial. The injury suffered is the undermining of the adversarial process from counsel's inability to subject those statements to the same level of adversarial scrutiny counsel could have had he been present at the interrogation. *Wade*, 388 U.S. at 240-43. Petitioner's proposed remedy would not address this injury. To the contrary, it would ratify the investigative techniques employed in this case, in deliberate violation of the defendant's right to counsel, and would encourage similar conduct by law enforcement in the future. The Sixth Amendment cannot countenance this result. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 620 (2004) (Kennedy, J.,

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[3] There can be little doubt, despite the Solicitor General's protestations, that the violation of the right to counsel in this case was deliberate. Mr. Doser, the informant, testified on cross-examination as follows:

> Q. Okay, and then you end up, what, being in contact with the county attorney about what you're going to do?
>
> A. No. Actually, all the information that I obtained from that cell was not to go to the county attorney, at all. It was to be delivered straight to a detective . . .

JA 153. This exchange demonstrates that the detective had placed Mr. Doser in Mr. Ventris's cell with the intent of extracting information from Mr. Ventris (without his counsel present), and had in fact instructed Mr. Doser specifically to obtain relevant information and pass it on to law enforcement.

concurring) (statements taken after a "deliberate" violation of a defendant's rights are subject to a "different" exclusionary rule analysis and must be excluded in order to deter police misconduct).

3. An impeachment exception for Assistance of Counsel Clause violations would sanction violation of the very right Petitioner's proposed rule of exclusion aims to protect. Although the use of evidence obtained in violation of the Fourth Amendment, *Miranda*, and *Jackson* does not violate an enumerated constitutional right, the use of uncounseled statements violates the right to Assistance of Counsel as enumerated in the Sixth Amendment. Use of such statements at any point during the trial, including for impeachment, would constitute as much of a violation as use in the prosecution's case-in-chief.

The Assistance of Counsel Clause, along with the other rights enumerated in the Sixth Amendment, governs the conduct of criminal prosecutions, and does not concern police conduct. So an exclusionary rule that purports to only deter the police from obtaining statements from an uncounseled accused in the absence of a waiver does not further the interests of the Sixth Amendment. Instead, the violation of the Assistance of Counsel Clause occurs when the prosecution uses the uncounseled statements at trial. An exclusionary rule for such violations with an impeachment exception would encourage, not deter, the use of uncounseled statements at trial.

4. The petitioner argues that civil liability under 42 U.S.C. § 1983 would bolster the deterrent effect of an exclusionary rule that permitted impeachment use of uncounseled statements in violation of the Assistance of Counsel Clause. However, the prospect

of civil or ethical liability would provide little practical deterrent.

Prosecutors and police would face little prospect of civil or ethical liability for using informants to obtain uncounseled statements from an accused. A prosecutor and the police enjoy qualified immunity while conducting investigations. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993). Qualified immunity protects them from liability except when their conduct violates clearly established statutory or constitutional rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). They typically instruct the informant not to elicit statements. The instructions to the informants shield the prosecutor and police from liability even when the informant disobeys them and deliberately elicits the desired statements. Similarly, prosecutors may not be ethically liable for their agents' misconduct under Model Rule 4.2. But the informant is still an agent for the prosecution when he disobeys those instructions, so the statements he elicits still implicate the Sixth Amendment if the prosecution uses them at trial. A prosecutor enjoys absolute immunity for performing the traditional functions of an advocate, such as presenting evidence at trial. *Imbler* v. *Pachtman*, 424 U.S. 409, 430-31 (1976). So a prosecutor would face no liability for actually using the uncounseled statements at trial.

5. There is no need to compromise the adversarial system by making uncounseled statements—especially those given to jailhouse informants—admissible for impeachment. A prior inconsistent statement is not necessarily indicative of perjury. Witnesses may be "impeached" on the stand without any finding of perjury, as such a finding requires not only false testimony but a willful intent to provide

false testimony. *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993). A witness in Respondent's position might, for example, "make up" stories about what he had done for self-protection reasons—so that he would be feared or (perversely) respected by other inmates. For this particular reason and others (including history and experience) the testimony of jail house informants is peculiarly unreliable. See Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63 (Praeger Publishers 2002).

Prior inconsistent statements may also result from anxiety, trauma, confusion, faulty memory, or mistake in recollection or perception. *Dunnigan*, 507 U.S. at 94. Evidence that a witness's in-court testimony differs from a previous statement does not necessarily mean the in-court statement was false—in many situations it would likely prove the opposite; namely, that the prior statement was the less accurate one. In all of these situations the lack of willful intent to falsify testimony would negate any claim of perjury. *Id.*

Even if Petitioner's proposed rule were rejected, Petitioner would still have ample tools to combat perjury that do not compromise the adversarial system. The Sixth Amendment right to counsel is "offense-specific." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991). "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Moulton,* 474 U.S. at 180 n.16. If the uncounseled statement provides such compelling evidence that an accused's testimony is perjurious, then the state may use it in a prosecution for perjury. Cf. *Portash*, 440 U.S. at 459. Scrupulously enforcing the Assistance of Counsel

Clause does not create a "right to commit perjury" any more than scrupulous enforcement of the Self-Incrimination Clause.

6. The Sixth Amendment ultimately resists the logic of an impeachment exception to the exclusionary rule. That logic rests on a balancing test between the benefits to the liberty interest protected and the social cost of excluding relevant evidence in the search for truth. *Nix*, 467 U.S. at 443-44. But the Sixth Amendment simply does not permit a balancing test between the rights designed to ensure a fair trial and the fairness of the trial. The Sixth Amendment commands "not that a trial be fair, but that. . . particular guarantee[s] of fairness be provided. . . . " *Gonzalez-Lopez*, 548 U.S. at 146. Although the Sixth Amendment ensures a fair trial, it does not permit judges to impair Sixth Amendment rights by creating rules to make trials fairer. The Framers have already performed the balancing test the petitioner asks this Court to take. The Assistance of Counsel Clause is the result.

7. A rule of total exclusion is the logical and practical implication of the Sixth Amendment. The text of the Sixth Amendment implies that uncounseled statements are inadmissible at trial, even for impeachment purposes. The Sixth Amendment commands that an accused enjoy the assistance of counsel. No reasonable interpretation of the Sixth Amendment text would permit anything that would undermine that right. The use of uncounseled statements at trial, even for impeachment, undermines just that right.

The Framers understood the right to counsel as the right to assistance of a skilled and informed advocate in attacking the prosecution's evidence in an adversarial process. *An Historical Argument for the*

Right to Counsel During Police Interrogation, *supra*, at 1033-34. The Court has held that counsel's absence from a pretrial interrogation necessarily impairs counsel's ability to attack the uncounseled statements from the interrogation when the prosecution uses them at trial. *Wade*, 388 U.S. at 229-30. In essence, the violation of the right to counsel from the use of uncounseled statements at trial is the denial of counsel.

The remedy for the denial of counsel at a critical stage in the prosecution is a new proceeding with competent counsel provided at each critical stage. See, *e.g.*, *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). Of course, a court cannot "vacate" an unlawful interrogation. Cf. *Wade*, 388 U.S. at 240-42. But a court can accurately predict what the outcome of the interrogation would have been had it been conducted in conformity with the Assistance of Counsel Clause. The prosecution would not have obtained statements for use for any purpose.

II. THE IMPEACHMENT EXCEPTION PROPOSED BY PETITIONER SWEEPS TOO BROADLY.

Neither the Sixth Amendment nor the exclusionary rule permit an impeachment exception for statements taken in violation of the defendant's right to counsel. But, even if such an exception should be crafted, the one proposed by Petitioner goes much too far. It would, in practice, allow the prosecution to introduce a defendant's uncounseled admissions *whenever* the defendant testifies.

Any uncounseled admission made by a defendant to police prior to trial that is in any way inconsistent with the defendant's testimony can be characterized as "impeachment evidence." These admissions, if the

government seeks to use them, will always reflect negatively in some way on the defendant, whether because they challenge the defense version of events, appear inconsistent with an aspect of prior testimony, or simply suggest bias of some sort. See, *e.g.*, *United States* v. *Abel*, 469 U.S. 45, 49-53 (1984) (holding that evidence of bias is admissible as impeachment evidence). And, because the defendant's credibility is always at stake when he takes the stand, see Br. for the U.S. at 9, 27, such statements will always "impeach" the defendant. This will give prosecutors a powerful incentive to obtain these admissions and to press judges to allow them into evidence. As a result, Petitioner's "admissible for impeachment rule" will quickly morph into a tautological formula for the admissibility of jail-house informant testimony in each and every case where the defendant takes the stand, no matter how tangential or incidental such testimony may be.

Indeed, taken to its logical conclusion, Petitioner's rule would undoubtedly *encourage* violations of the right to counsel. The most opportune time to take a statement is before the accused has had an opportunity to speak with counsel, and police and prosecutors will surely take advantage of that opportunity. By merely holding such statements, the prosecutor can deter the defendant from taking the witness stand and may be able to force a favorable plea agreement. And, of course, should the defendant nevertheless exercise his or her right to testify, the prosecution can introduce the statements to secure a conviction. This result is hardly a mere "speculative possibility." *Harris*, 401 U.S. at 225. It is, rather, exactly what happened in this case: officers infringed the defendant's right to counsel by taking an uncounseled statement, and the prosecution later

compounded that infringement by introducing the statement at trial. If this conduct is upheld in this case, it will certainly be repeated in others.

These problems could be avoided through a more limited exception, admitting uncounseled statements only when necessary to prevent intentional false testimony. The primary concern raised in support of an impeachment exception is the possibility that, if the use of uncounseled statements is altogether foreclosed, defendants may feel free to perjure themselves on the stand without fear of challenge by the prosecution. But this problem can be addressed through a rule permitting introduction of these statements only when the prosecution can demonstrate, to the judge, that the defendant has in fact intentionally testified falsely. This standard will ensure that perjured statements do not go unchallenged and will deter defendants from testifying untruthfully in the first instance. As importantly, it will place some meaningful restrictions on the government's use of uncounseled statements, dissuading prosecutors and police from trying to obtain these statements in violation of the Sixth Amendment.

* * *

The Framers understood the right to counsel as the foundation of our adversarial system of justice. The integrity of the adversarial system is at stake in this case. The petitioner argues that it should be allowed to benefit from undermining that system. This would move our system of justice a step closer to an inquisitorial system, wherein the state seeks not to prove to the public whether the persons it has chosen to prosecute have committed the crimes of which the state accuses them, but whether they could be made

to confess their crimes. Without appropriate respect for individual rights, such a system would be rife with abuse. Given the appropriate procedural safeguards, such a system may prove reliable. But it would not be the system envisioned by the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of Kansas.

Respectfully submitted,

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